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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAUL F. CONARTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MARY ELLEN DIENES
Counsel of Record
120 South Riverside Plaza
Suite 1150
Chicago, Illinois 60606
(312) 207-5454

Counsel for Petitioner, Paul F. Conarty

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the court of appeals has sanctioned a departure by the lower district court from the accepted and usual course of judicial proceedings in condoning the lower court's failure to adequately voir dire the jurors as to the extent that unauthorized prejudicial material was brought to the jury's attention.

2. Whether clarification is required for the standard of review to be applied in reviewing cases involving the intrusion of unauthorized materials into the jury room during deliberations, where the lower court failed to take minimal steps to inquire to what extent the unauthorized materials were brought to the jurors' attention and where there was a reasonable possibility that the use by the jurors of the unauthorized materials may have changed the outcome of the case.

3. Whether the en banc opinion of the court of appeals has departed from the accepted and usual course of judicial proceedings in affirming petitioner's convictions despite the strong indications that the government's surreptitious insinuation of its binders (summarizing the government's theory of the case and evidence in support thereof) into the jury room was intentional and that the jurors' use of the binders changed the outcome of the trial.

PARTIES INVOLVED

Petitioner Paul F. Conarty and codefendants John C. Best and Gregory J. Bewick were the defendants in the United States District Court, Northern District of Illinois, and appellants in the Seventh Circuit Court of Appeals. (Best and Bewick are filing a separate petition for writ of certiorari.) The United States of America was plaintiff below and appellee in the circuit court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul F. Conarty, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the convictions of petitioner and his codefendants.

OPINIONS AND ORDERS BELOW

A panel of the Seventh Circuit Court of Appeals reversed petitioners' convictions. That opinion is set out in the Appendix[1] at App. 25-36 and is reported at 913 F.2d 1179. The judgment order of the Circuit Court is set out

[1] This petition is brought on behalf of Petitioner Paul F. Conarty. His codefendants below, John C. Best and Gregory J. Bewick, have filed a separate petition for writ of certiorari. Petitioner Conarty and codefendants Best and Bewick will seek to file in this Court a separate Joint Appendix to Petitions for Writ of Certiorari. Citations in the instant petition to App. ____ refer this Court to that joint Appendix.

at App. 37. An order vacating the panel opinion and granting rehearing en banc is set out at App. 45 and is noted at 924 F.2d 646. The opinion of the Seventh Circuit en banc, affirming the convictions of petitioner and his codefendants by a majority of six to five, and the dissenting opinion, are set out at App. 1-22 and reported at 939 F.2d 425. The court's judgment order is set out at App. 23-24.

JURISDICTIONAL STATEMENT

On July 3, 1991, a unanimous panel of three judges of the Seventh Circuit Court of Appeals filed its opinion. (App. 25-36) Following a petition for rehearing by the government, the court on January 25, 1991 vacated the panel opinion and ordered rehearing en banc. (App. 45) The court entered its en banc opinion on August 5, 1991. (App. 1-22) This petition for a writ of certiorari is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10.1(a) and 13.1 of this Court.

CONSTITUTIONAL PROVISIONS

Petitioner maintains that his rights under the following provisions of the fifth and sixth amendments to the United States Constitution were violated by the en banc opinion of the circuit court:

AMENDMENT V

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATUTORY PROVISION

Fed. Rules Evid. Rule 606, 28 U.S.C.

Rule 606. Competency of Juror as Witness.

* * *

(b) Inquiry into validity of verdict or indictment

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

Petitioner Paul F. Conarty and his two codefendants below (John C. Best and Gregory J. Bewick)[2] were indicted on thirty-five counts of mail fraud, misapplication of bank funds, bank fraud, and other offenses committed during the course of the failure of the American Heritage Savings and Loan Association, a federally insured institution, due in large part to the making of a number of loans to

[2] Codefendants Best and Bewick are filing a separate petition for writ of certiorari.

noncreditworthy borrowers. Best and Bewick were officers of the institution.[3]

The savings and loan had been in a precarious state since 1981. It owned, through wholly owned subsidiaries, a number of commercial real estate holdings. Codefendants Best and Bewick engaged in approving the making of loans conditioned on the borrower's agreeing to buy real estate from one of the institution's subsidiaries, and applied a portion of the monies borrowed to the down payment for the purchase of the real estate. Typically, the borrower was uncreditworthy.

Petitioner Paul F. Conarty became in-house counsel for the savings and loan institution in January, 1983. Prior to that time, he had no substantial involvement in the institution's affairs. Shortly thereafter, the institution failed.

In mid-February, 1983, six weeks after Conarty joined the institution, the loan on the Kings Point real estate development closed. Kings Point was the only transaction on which the charges against Conarty were founded. The Kings Point loan was to be made to a partnership consisting of three individuals—Henning, Pernice, and Andreuccetti—but the loan ultimately went to Andreuccetti because Henning and Pernice were ineligible to borrow from the institution, having reached their loan limit. (Tr. 5363-65)

At the Kings Point loan closing in February, 1983, the checks not earmarked for the down payment on the Kings Point property were made payable to Pernice and Henning,

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[3] The circuit court's majority opinion incorrectly states that Conarty was also an officer. He was not. Conarty did not join the institution until January, 1983, after all loan transactions had been approved by the institution's loan committee.

rather than to Andreuccetti, the borrower of record. Years earlier, Conarty, an attorney, had performed legal services for Henning and also for Pernice, for which he had not been fully compensated. Henning then caused checks to be "cut" to Conarty that paid Henning's full indebtedness to Conarty. Likewise, Pernice also cut a check to Conarty to pay off his pre-existing debt for legal services. (Tr. 5368-70)

After the savings and loan institution failed in 1983 and went into receivership, Best and Bewick were terminated as officers. Conarty continued to work at the institution until 1985, even after it passed into the hands of the Federal Home Loan Bank Board and later the Federal Savings and Loan Insurance Corporation. (Tr. 5370-71)

The government commenced criminal prosecution in the United States District Court for the Northern District of Illinois pursuant to 18 U.S.C.A. § 3231. Petitioner Conarty was named in only eight of the thirty-five indictment counts.

The trial lasted seven weeks. Most of the evidence at trial related only to codefendants Best and Bewick and their relationship to a number of the loans. Only a very small amount of the government evidence was directed at Conarty. Of the eight indictment counts relating to Conarty, one charged him and his two co-defendants with conspiracy; two counts charged him with mail fraud for allegedly sending through the mails documents in connection with the Kings Point loans: a Form 107 and a recorded warranty for Kings Point Buildings 5 and 6. Three counts charged Conarty with misapplication of savings and loan funds by causing the loan of savings and loan money to Buildings 3, 4 and 5 of Kings Point. Two counts charged Conarty with allegedly receiving monies (the checks from

Henning and Pernice) from the Kings Point Building 4 loan with intent to defraud the savings and loan.

Conarty's defense at trial was that he had nothing to do with the approval of any of the loans in question or any substantive decisionmaking as to the loans (he had not yet joined the bank until after all the loans had been approved by the institution's loan committee) and was unaware that the loans were undersecured, that he had no intent to defraud, and that (by the account of defense and government witnesses), the checks he received from Pernice and Henning were proper reimbursement for legal services he had performed for those two men in the past.

During the trial, the Government utilized three-inch ring binders to present some of its key documentary exhibits to the jury. The binders were divided by plastic tabs into sections, each representing a loan transaction. There were thirteen such sections, including sections on the Kings Point loans.[4] Each of the jurors was in possession of one of the binders during the trial. The binders were not marked as exhibits. The government never asked the trial court to admit the binders in evidence. The jurors were told not to look at any of the documents in the binders unless directed to do so. (App. 93) The binders were not available to the jurors during recess. (App. 85-86)

At the close of the evidence and before jury deliberations began, the prosecutors and defense counsel reviewed the exhibits to be submitted to the jury. (Tr. 5959-60) Counsel advised the court that the exhibits to go to the

[4] Petitioner Conarty and codefendants Best and Bewick (who have filed a separate petition for writ of certiorari) have filed in this Court a motion asking this Court to direct the Seventh Circuit Court of Appeals to transmit the binders to this Court.

jury (ten boxes of documents) were set aside. Defense counsel left the courtroom. (App. 87, 112)

Later, one of the government prosecutors and an FBI agent placed a number of the government's binders onto the exhibits cart, which was later taken to the jury. (App. 50-56, 59-60, 62-64, 67-69, 75-76, 78-80)

All of the documents within the government's binders were admitted in evidence at trial. However, not all of the documents were admitted against all of the defendants, although the order of the documents in the government's binder obscured that fact.

The jury retired to deliberate on Tuesday, June 9, 1987. (App. 67) On Friday, June 12, 1987, defense counsel learned for the first time (from an offhand remark by the courtroom marshal) that the government binders had been sent back to the jury. (App. 69, 88) Counsel for Conarty and his codefendants joined in a motion for mistrial based on the introduction of the binders into the jury room. (App. 87-88) The court ordered the binders removed from the jury room that evening (Friday, June 12). (App. 96)

The jury returned Monday morning, June 15, to continue deliberations. The foreperson inquired about the fact the binders were no longer in the jury room. The jury was not told why the binders were removed. (App. 101-107) The jury returned its verdict that afternoon. (App. 107) Conarty was found guilty of six of the eight counts with which he was charged.

The court later conducted a voir dire examination of the jurors. Despite suggestions by defense counsel for questions to be put to the jurors, the court asked only one question of each juror: whether he or she had used the government binders to the exclusion of the original trial

exhibits in the ten boxes. All the jurors said that they had relied to some degree on the binders, but that they also examined original exhibits. (App. 134-147)

Subsequently, defense counsel submitted sworn affidavits in which they averred that prior to the time the jury began to deliberate, one of the defense counsel had approached Assistant United States Attorney Susan Bogart and inquired whether Ms. Bogart was going to ask leave to send the binders back to the jury. Ms. Bogart represented that she was not going to do so. (App. 46-76, 90-93, 107-120) One month later, the government responded to the defense's allegation of prosecutorial misconduct by tendering to the court a written memorandum and two statements. Labelled as affidavits, these were unsworn statements by Assistant United States Attorney Bogart and an FBI agent. (App. 77-83)

The government never denied that it never informed the defense that it would send the binders back to the jury room. The prosecutor did deny telling defense counsel that she would not send the binders to the jury (App. 63, 92); but her denial was not on oath, either by way of a sworn affidavit or by sworn in-court testimony. Throughout the several weeks that the defense motion for mistrial based on prosecutorial conduct was pending, the government unfailingly objected to the court conducting an evidentiary hearing on the issue of prosecutorial misconduct. (App. 81-83)

Most of the facts surrounding the entry of the binders into the jury room were not in dispute. It is undisputed that the government never asked leave of court to send the binders to the jury. The binders were in the jury box when defense counsel left the courtroom, whereas the exhibits to be taken to the jury had been segregated. After

defense counsel walked out of the courtroom Assistant United State's Attorney Bogart and the FBI agent took the binders from the jury box and placed them on the cart containing the trial exhibits that the court had ruled could be viewed by the jury. The cart was taken to the jury room. (App. 55-56, 78-79, 81-83)

Following the convictions of Conarty and his codefendants the district court judge sentenced codefendant Best to a year and a day in prison and sentenced codefendant Bewick to six months on work release. The court sentenced petitioner Paul F. Conarty to probation. All three appealed to the Seventh Circuit Court of Appeals. The opinion of a three-judge panel (authored by Circuit Judge Posner) reversed their convictions and ordered a new trial. (App. 25-36) The panel termed the government's action in this case "misconduct" (App. 36) and noted:

> The furnishing of these binders to the jurors was, in the circumstances, a form of jury tampering—a subtle form, but perhaps not less effective because of its subtlety. The case is within the orbit of the decisions that find reversible error when documents summarizing the government's case find their way into the jury room. [App. 35]

Signally, the panel opinion observed:

> This was a close case, and the government's misconduct may well have made a difference to the outcome, *at least with regard to defendant Conarty*, and to some of the counts against the other defendants as well. [App. 36]

The government's petition for rehearing en banc was allowed, and the cause was reargued. In a six-to-five en banc decision, the Seventh Circuit Court of Appeals vacated the panel opinion and affirmed the judgment of the district court. (App. 1-22)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

When it became apparent that the prosecution had caused its binders of government exhibits to be sent to the jury room with trial exhibits, the district court judge acted correctly in promptly removing the binders from the jury room. When the court conducted its voir dire of the jurors after the jury verdicts were returned, however, the court erred in making only a superficial inquiry whether the jurors had used the binders to the exclusion of the original exhibits, and then denying petitioner's motion for a mistrial. The court should have made a more detailed inquiry to determine whether the binders had altered the jury verdicts.

Absent a proper inquiry by the trial court into the impact of the binders on the jury's verdicts, the six-judge majority of the circuit court of appeals should have considered further the question whether petitioner was prejudiced by the introduction of the binders. The five-judge dissent properly noted that the majority prematurely affirmed the trial court judgment without inquiring whether the petitioner was prejudiced by the introduction of the unauthorized binders into the jury room. The dissenting opinion makes a strong case for this Court scrutinizing the standard for review applicable to cases in which unauthorized materials have been intentionally and secretly sent into the jury room.

The record in this case provides ample evidence to demonstrate that the government's action in insinuating its unauthorized binders into the jury room, as a "blueprint" of the government's case, was intentionally designed to convey to the jurors the false impression that exhibits ad-

mitted at trial against petitioner's codefendants were equally applicable to petitioner. The result was that the government binders acted as a thirteenth juror in the jury room, to deny petitioner of his constitutional rights to due process of law and trial by an impartial jury.

I.

THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE LOWER DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONDONING THE LOWER COURT'S FAILURE TO ADEQUATELY VOIR DIRE THE JURORS CONCERNING THE EXTENT TO WHICH UNAUTHORIZED AND PREJUDICIAL MATERIAL WAS BROUGHT TO THE JURY'S ATTENTION DURING ITS DELIBERATION.

Of all the rights granted to us by our federal constitution, the right to trial by a fair and impartial jury of our peers is one of those most cherished. Trial by jury in criminal cases is fundamental to the American scheme of justice. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor . . . ." *Id.*

In the instant case, petitioner Paul Conarty was deprived of that fundamental right when an overzealous prosecutor insinuated into the jury room, without knowledge of the trial court or defense counsel, twelve or more copies of a three-ring binder containing carefully ordered exhibits which provided the jury with a roadmap to the government's case so as to find petitioner Conarty and his codefendants guilty of the charges against them. The effect of the introduction of the binders into the jury room

was devastating to the defense. In effect, the binders became a thirteenth juror, a government prosecutor leaning over the jurors' shoulders and showing them a blueprint to signing guilty verdicts.

The initial question is whether it was error to send unauthorized documents to the jury room. Patently, the authorities proclaim that that practice is error. *See United States v. Brown*, 451 F.2d 1231 (5th Cir. 1976); *Sanchez v. United States*, 293 F.2d 260 (8th Cir. 1961); *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

The panel opinion and the opinion of the circuit court en banc recognized this principal and its support in the law. However, because all of the documents in the government's binder had been admitted in evidence at trial and were duplicates of exhibits among the ten boxes of exhibits which the trial court allowed the jury to have during deliberations, both the trial court and the majority of the circuit court of appeals en banc concluded that the use of the binders by the jury during deliberations was harmless error, and made their rulings with no further analysis.

The majority of the circuit court en banc ruled that the threshold issue was "whether the district court acted reasonably in refusing to set aside the verdict because it found no possible prejudice." [Citing *United States v. Bruscino*, 687 F.2d 939, 940 (7th Cir. 1982) (en banc). [App. 8] The circuit court majority concluded that if it were found that the district court did not abuse its discretion, the issue of government misconduct need not be reached. [App. 8]

The majority and dissent noted that a review by a circuit court of appeals of a district court's judgment is

deferential. [App. 8-9, 21] The point of departure between the majority and the dissent came with the manner in which the district court judge handled the problem once it became known the jurors had the government binders.

The jury deliberated from Tuesday through Friday. On Friday, June 12, 1987, defense counsel learned that the jurors had possession of the government binders. (App. 69, 88) At the trial court's direction, the binders were removed from the jury room Friday night after the jurors went home for the weekend. (It was discovered that the binders contained notes and papers inserted into their pages, suggesting that the binders were heavily used by all the jurors.) When the jurors returned Monday morning and realized the binders were gone, they notified the court. After lunch on Monday, and before the court responded to the jurors' inquiry about the binders, the jurors returned their verdicts. (App. 101-07)

Prompted by the defendants' motion for a mistrial, the district court conducted an inquiry of each juror before the jury was dismissed. Rejecting defense counsels' suggested line of questioning, the court asked only one question of each juror: whether they had consulted the original exhibits as well as the binders. When the jurors said they had, the court denied the motion for a mistrial. (App. 134-148, 158-159)

This was error. The district court's inquiry did not go far enough. As the circuit court's dissenters noted:

> It is the rare case of introducing unauthorized materials into the jury room in which the jury looks *only* at those materials. That cannot be the decisive consideration. Nor the fact that the exhibits in the binders were in evidence . . . . The binders—Ariadne's thread through the maze constituted by the ten boxes of original exhibits—were not in evidence. [App. 21]

Inquiry into the reasoning process by which a jury reaches its verdict is precluded by court rule, Fed. R. Evid. 606(b). That rule, however, does not prohibit inquiry into the prejudicial impact of extraneous information on the jury's deliberations. The court must take steps to insure that jury deliberations are unimpeded by outside influence. *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980), *cert. denied* 450 U.S. 1035 (1981). *See United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972).

In the case at bar, the trial court abrogated its responsibility when it conducted only a cursory examination of the jury. Having determined that each juror had relied to some extent on the government binder in reaching his or her verdict, the district court judge should have inquired further. As the dissent noted, the court should have inquired into the effect on the jury's deliberations of the order in which the exhibits were presented in the government's binders:

> —for example, had the jurors assumed that Conarty had seen Andreucetti's financial statement and the other documents for the Kings Point loan? On the basis of such inquiry, plus an evaluation of the strength of the evidence against Conarty and the other defendants, the judge could have made an informed and responsible decision as to whether there was a reasonable possibility that the use of the binders in the jury's deliberations had changed the outcome of the case—and we would be bound by that decision. The judge's perfunctory and loaded inquiry (e.g., "Did you use the jury book to the exclusion of all the other exhibits and evidence you heard in the case?") suggests more than anything else a determination not to have to sit through another seven-week trial. [App. 21-22]

Noting that the district court's failure to exercise discretion could not be remedied (because "[t]he jurors are scat-

tered to the winds and can no longer be questioned about the impact of the binders"), the five circuit judges in dissent concluded that the only remedy is to award petitioner and his codefendants a new trial. [App. 22]

II.

CLARIFICATION IS REQUIRED FOR THE STANDARD OF REVIEW TO BE APPLIED IN REVIEWING CASES INVOLVING THE INTRUSION OF UNAUTHORIZED MATERIALS INTO THE JURY ROOM DURING DELIBERATIONS, WHERE THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE POSSIBILITY THAT THE USE OF THE UNAUTHORIZED MATERIALS BY THE JURORS MAY HAVE CHANGED THE OUTCOME OF THE CASE.

The authorities do not permit reversal of a conviction unless there was a "reasonable possibility" that the error (the presence in the jury room of unauthorized materials) affected the jury's verdict. *United States v. Bruscino, supra,* 687 F.2d at 940. Whether such a reasonable possibility exists is a judgment to be made in the first instance by the trial judge. In cases in which the issue of introduction of unauthorized materials into the jury room is raised, courts of appeal have affirmed a district court judge's refusal to declare a mistrial where the district court has framed the inquiry relevant to his exercise of discretionary judgment in a responsible fashion. *See, e.g., United States v. Wiseman,* 736 F.2d 421, 426 (7th Cir. 1984).

The circuit court dissenters noted in the instant case, however, that the district judge failed to frame the relevant inquiry in a proper and responsible fashion. The dissent correctly concluded that an affirmance of the trial court's judgment was error.

The crucial area of inquiry, which the district court and the majority of the circuit court erroneously refused to entertain, is whether there was a reasonable possibility that the use of the government binders in the jury's deliberations had changed the outcome of the case.

Petitioner Conarty maintains, as did the five dissenting circuit judges, that there was a reasonable possibility that the use of the binders altered the jury's verdict. The fact all documents in the government's binder had been admitted in evidence was not determinative and did not render the error harmless, and that the trial court's post-verdict limited questioning of the jurors was incomplete, for these reasons:

1. The jurors were not permitted to use the binders during trial for the purpose of considering guilt or innocence, for the reason that they were charged not to begin deliberations until the parties had rested and the jury had been sent to deliberate. The only use made by the jurors to the binder documents during trial was to view specific exhibits as the government utilized them during trial and offered them in evidence.

2. While all the documents had been admitted in evidence during trial, not all had been admitted against Conarty. For example, the three sections of the binder dealing with the Kings Point loan closings contain, *inter alia*, loan applications by Joseph Andreuccetti, financial statements indicating his creditworthiness was suspect, loan commitment papers, loan settlement statements, and, finally, checks issued to Conarty for what every witness at trial (government and defense) who testified to this point described as payment for prior legal services by Conarty to borrowers Henning and Pernice, completely unrelated to the Kings Point loans or any other loans

made by the Savings and Loan. The documents pertaining to the application for and approval of the Kings Point loans in late 1982 had nothing to do with Conarty. Again, every government and defense witness who testified on this subject stated that Conarty joined the S&L in January, 1983, *after* the loans had been approved by the institution's loan committee. (See Tr. 4615, 4974) However, the government's binder so arranged the binder as to include both the paperwork from the Loan Committee and the checks issued to Conarty, suggesting falsely and unfairly that the loans to Conarty were payment to him for helping to secure the loans.

3. The government intentionally and secretively insinuated the binders into the jury deliberation room. This is patent from the district court record, where, in a written statement, an FBI agent admitted that he loaded the binders onto the cart containing exhibits bound for the jury deliberation room. (App. 77-78)[5] Though concerned about the possibility the government had acted deliberately to place the binders with the jurors, the trial court refused to hold a hearing on the allegation of government misconduct. The court ruled that the fact all the documents in the government binders were in evidence was dispositive on the ground the error was harmless, whether or not the government's action was intentional. The trial court's refusal to conduct a hearing on the issue of government misconduct was reversible error.

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[5] The majority opinion of the circuit court *en banc* is in error in stating that "the record contains the conflicting affidavits of the prosecutor and the defense counsel . . ." (App. 14) The defense attorneys filed affidavits [reproduced at App. 46-76]; the prosecutor and FBI agent filed non-sworn statements [App. 77-83].

III.

THE EN BANC OPINION OF THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN AFFIRMING PETITIONER'S CONVICTIONS DESPITE THE STRONG INDICATIONS THAT THE GOVERNMENT'S INTRUSION OF ITS EXHIBIT BINDERS INTO THE JURY ROOM WAS INTENDED TO, AND DID, CHANGE THE OUTCOME OF THE TRIAL.

The trial court's refusal to go beyond the question of whether the binder documents were in evidence, and its refusal to conduct a hearing into the misconduct of the prosecutor, constituted reversible error which deprived petitioner Paul F. Conarty the right to due process of law pursuant to the fifth amendment and deprived him of the right to trial by a fair and impartial jury under the sixth amendment. U.S. Const. amends. V, VI.

The main objectives of the government prosecution were codefendants Best and Bewick, two officers of the savings and loan who were charged in most of the thirty-five counts in the indictment; Conarty was charged in only eight of the counts. Before trial, petitioner Conarty moved to sever his prosecution from that of his codefendants; his motion was denied on the basis of one count (Count 1), alleging conspiracy between him and codefendants Best and Bewick. Conarty was ultimately acquitted of the conspiracy count. His convictions for mail fraud, misapplication of bank funds, and bank fraud concerned only one set of loan transactions (the Kings Point loans) and had virtually no connection with the convictions of his codefendants. In the district court and in the circuit court of appeals, Conarty alleged that the joinder was error.

The government's introduction of the binders into the jury room seems to have been aimed at securing a con-

viction against Conarty, against whom its case was the most tenuous; and Conarty surely was prejudiced far more by the binders than his codefendants. This was not lost on Circuit Judge Posner who, writing for the five dissenters, noted:

> I said that you can convict a man with a tendentious compilation of evidence. I will illustrate with Conarty. Best and Bewick, Conarty's two codefendants, were, respectively, the top man and the second in command at a savings and loan association. They were charged with approving a number of improper loans, but Conarty, the association's in-house counsel, was charged in connection with only one of these transactions, the Kings Point loan. It was a loan to a partnership, but two of the three partners were ineligible to borrow from the bank. One of them, Henning, was in bankruptcy. This much Conarty undeniably knew because he was one of Henning's creditors and had filed a claim in the bankruptcy proceeding. Another partner, Andreuccetti, also was uncreditworthy, although there is no evidence that Conarty knew this. At the closing, some of the loan moneys were paid directly to Henning, who then cut a check to Conarty that paid off Henning's indebtedness to him in full. Pernice, the third borrowing partner, also used a portion of the loan moneys to pay a preexisting debt to Conarty. Conarty received a total of $13,000 at the closing. The loan was improper, and if Conarty knew this he was guilty of fraud. There was circumstantial evidence—not least the use of a part of the loan to pay off unrelated debts to him—that he did know. But it was a close case. One reason Judge Bua gave for not quizzing the jurors about the binders before the jury completed its deliberations was that the issue would be moot if the jury returned verdicts of not guilty. In his words, "there's a chance, and I see it quite possible, that Mr. Conarty's case could very well go not guilty."

> The government binders made it easy for the jury to infer Conarty's guilty knowledge, because they grouped all the documents relevant to the Kings Point transaction under one tab, which the boxes of original documents did not do. There were the checks cut to Conarty right alongside the loan documents themselves. In fact the checks were located in the binder directly after Andreuccetti's unimpressive financial statement, demonstrating his lack of creditworthiness, even though there was no evidence that Conarty (who was not a member of the savings and loan association's loan committee) had ever seen the statement, or for that matter the loan documents. It was a suggestive juxtaposition. [App. 18-19]

Trial error prejudicial to petitioner occurred when both the district court and the en banc majority opinion refused to consider the involvement of the government in surreptitiously introducing its binders into the jury room. *United States v. Bruscino*, 687 F.2d 938, 939-40 (7th Cir. 1982). The government's intentional submission of unauthorized material to the jury deprived petitioner of due process of law and of his right to be trial by a fair and impartial jury.

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial with the opportunity to be heard.

Oliver Wendell Holmes, *Frank v. Mangum*, 237 N.S. 309, 347 (1914). A fundamental element of the due process of law is the criminal defendant's right to present a defense. *Hamling v. United States*, 418 U.S. 87, 125 (1974); *Washington v. Texas*, 388 U.S. 14 (1967). In the case at bar, that right was denied petitioner, because the prosecution gained access to the jury during its deliberations and became, in effect, a thirteenth juror to sway the jury to return a guilty verdict.

CONCLUSION

For all of the foregoing reasons, petitioner PAUL F. CONARTY respectfully requests that this honorable Court grant certiorari to review the en banc ruling of the Seventh Circuit Court of Appeals and, upon such review, to reverse the Court of Appeals and remand the cause to the district court with directions that the indictment be quashed and petitioner be discharged or, alternately, that petitioner be granted a new trial.

Respectfully submitted,

MARY ELLEN DIENES
Counsel of Record
120 South Riverside Plaza
Suite 1150
Chicago, Illinois 60606
(312) 207-5454

Counsel for Petitioner,
Paul F. Conarty